Sabah Berjaya Sdn Bhd v Director General of Inland Revenue Department & Anor

HIGH COURT (KOTA KINABALU) — ORIGINATING MOTION NO K25–19 OF 1994
TEE AH SING JC
4 JANUARY 1996

Civil Procedure *— Prerogative writs/orders — Certiorari — Application for — Whether application for leave made within time prescribed by O 53 of the Rules of the High Court 1980 — Whether delay satisfactorily accounted for — Whether domestic remedies have to be exhausted before application for judicial review is made — Rules of the High Court 1980 O 53 r 1A*

Administrative Law *— Remedies — Certiorari — Additional assessments of income tax — Whether domestic remedies have to be exhausted before application for certiorari is made — Whether court has discretion to grant leave even though domestic remedies not exhausted*

Limitation *— Public Authorities Protection Act 1948 — Whether action time-barred — Application for certiorari to quash directions of Director-General of Inland Revenue — Allegation that directions null and void — Whether Public Authorities Protection Act 1948 applies*

The applicant filed a notice of motion for, inter alia, an order for an extension of time for the filing of its application for leave to apply for certiorari to quash directions dated 30 November 1987 issued by the Director-General of Inland Revenue ('the first respondent'). In 1987, the first respondent issued a series of notices of additional assessment and directions under ss 91 and 140 of the Income Tax Act 1967 ('the Act') to the applicant. The directions stated that payments made by the applicant to the Sabah Foundation between the years of assessment 1980 and 1987 would be treated as dividends and hence not allowed as deductions for tax purposes. These payments were originally treated by the first respondent as approved donations and were allowed as deductions under the Act. The applicant filed formal appeals against the directions and notices of assessment with the Special Commissioners of Income Tax ('the second respondent') pursuant to s 99 of the Act. During the hearing of appeals in 1994, it was revealed that at the time of the issue of the directions, the first respondent had no evidence of new facts that justified a departure from the original notices of assessment, and that documents that may remotely have justified the first respondent issuing the directions to override the original notices of assessment, were extracted from the Sabah Foundation's offices after the first respondent issued the directions. The applicant's appeals were dismissed by the second respondent. The applicant applied for certiorari to quash the directions and notices of additional assessment within six weeks of the second respondent's deciding order, arguing that the revelations were special circumstances which justified the applicant seeking judicial review

rather than to be confined to the appeal procedure provided by the Act. It was also contended that the 1987 assessments were void and that the application for certiorari was, in view of the circumstances, within the time prescribed by the rules of the court. The respondents submitted that: (i) the applicant had not shown good grounds for the delay in applying for judicial review; (ii) s 2(a) of the Public Authorities Protection Act 1948 ('the PAPA 1948') was a bar to the application; (iii) the 1987 assessments and directions and the 1994 deciding order cannot be regarded as one proceedings for the purposes of O 53 r 1A of the Rules of the High Court 1980 ('the RHC') as the duties of the first respondent and the second respondent respectively are separate and distinct; and (iv) the domestic remedies had not been exhausted.

Held, allowing the application:

(1) The 1987 assessments and directions and the 1994 deciding order cannot be regarded as one proceedings for the purposes of O 53 r 1A of the RHC. This is because the duties of the first respondent and the second respondent respectively are separate and distinct (see p 379D–E).

(2) The delay for the hearing of the appeal before the second respondent was beyond the applicant's control (see p 379H).

(3) Section 2(a) of the PAPA 1948 is not applicable where issues of nullity are raised. In the present case, as the applicant alleged the nullity of the 1987 assessments, s 2(a) does not apply (see pp 379I–380A); *Semantan Estate (1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan* [1987] 2 MLJ 346 distinguished.

(4) It was only at the hearing before the second respondent that the applicant discovered that the first respondent had issued the directions and additional notices of assessment without any new evidence. It was a matter which had newly come to the knowledge of the applicant and thus explained the delay in seeking judicial review (see p 380A–B).

(5) The applicant need not have exhausted all domestic remedies and its rights of appeal before applying for certiorari. The discretion to grant the remedy remains with the courts but where there is an appeal provision available to the applicant, certiorari should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or, in appropriate cases, a serious breach of the principles of natural justice. The discovery of the new fact in this case may come within this exception. The applicant has thus accounted for the delay in making the application for leave for an order of certiorari (see p 380C–F); *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185 followed.

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[**Bahasa Malaysia summary**

Pemohon telah memfailkan notis usul memohon, antara lainnya, satu perintah perlanjutan masa untuk memfailkan permohonannya untuk kebenaran memohon certiorari bagi membatalkan perintah-perintah bertarikh 30 November 1987 yang dikeluarkan oleh Ketua Pengarah Hasil Dalam Negeri ('penentang pertama'). Dalam tahun 1987 penentang pertama telah mengisukan kepada pemohon, suatu siri notis taksiran dan arahan tambahan di bawah ss 91 dan 140 Akta Cukai Pendapatan 1967 ('Akta tersebut'). Arahan-arahan tersebut menyatakan bahawa bayaran-bayaran yang telah dibuat oleh pemohon kepada Yayasan Sabah di antara tahun-tahun taksiran 1980 dan 1987 akan dianggap sebagai dividen, maka ianya tidak dibenarkan sebagai penolakan untuk sebab-sebab pencukaian. Bayaran-bayaran tersebut pada mulanya dianggap oleh penentang pertama sebagai derma yang diluluskan dan ianya telah dibenarkan sebagai penolakan di bawah Akta tersebut. Pemohon telah memfailkan rayuan formal terhadap arahan dan notis taksiran itu dengan Pesuruhjaya Khas Cukai Pendapatan ('penentang kedua') menurut s 99 Akta tersebut. Semasa pembicaraan rayuan-rayuan tersebut dalam tahun 1994, telah didedahkan bahawa pada masa mengisukan arahan-arahan tersebut, penentang pertama tidak ada keterangan fakta baru yang menjustifikasikan perubahan daripada notis-notis taksiran yang asal, dan bahawa dokumen-dokumen yang mungkin secara jauhnya dapat menjustifikasikan tindakan penentang pertama mengisukan arahan-arahan itu untuk mengatasi notis-notis taksiran asal, telah diambil dari pejabat Yayasan Sabah selepas penentang pertama mengisukan arahan-arahan tersebut. Rayuan pemohon telah ditolak oleh penentang kedua. Pemohon telah memohon untuk certiorari untuk membatalkan arahan dan notis taksiran tambahan dalam tempoh masa enam minggu setelah perintah keputusan penentang kedua. Dihujah oleh pemohon bahawa pendedahan tersebut merupakan keadaan-keadaan khas yang menjustifikasikan tindakannya memohon kajian semula kehakiman dan tidak menurut prosedur rayuan yang diperuntukkan oleh Akta tersebut. Juga telah dihujahkan bahawa taksiran-taksiran 1987 adalah terbatal dan bahawa permohonan untuk certiorari adalah, memandangkan keadaan kes, dalam tempoh masa yang diperuntukkan oleh kaedah-kaedah mahkamah. Penentang telah menghujahkan bahawa: (i) pemohon telah tidak menunjukkan dasar-dasar yang wajar untuk kelambatan dalam memohon untuk kajian semula kehakiman; (ii) s 2(a) Akta Perlindungan Pihak Berkuasa Awam 1948 ('Akta 1948') merupakan halangan kepada permohonan ini; (iii) taksiran dan arahan 1987 serta perintah keputusan 1994 tidak dapat dianggap sebagai satu prosiding untuk tujuan A 53 k 1A Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') kerana tugas penentang pertama dan penentang kedua masing-masing adalah berasingan dan berlainan; dan (iv) remedi domestik belum dihabiskan lagi.

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A **Diputuskan**, membenarkan permohonan itu:

(1) Arahan dan taksiran 1987 dan perintah keputusan 1994 tidak boleh dianggap sebagai satu prosiding untuk tujuan A 53 k 1A KMT. Ini adalah kerana tugas penentang pertama dan penentang kedua masing-masing adalah berasingan dan berlainan (lihat ms
B 379D–E).

(2) Kelambatan untuk pembicaraan rayuan di hadapan penentang kedua adalah di luar kawalan pemohon (lihat ms 379H).

(3) Seksyen 2(a) Akta 1948 adalah tidak terpakai di mana isu pembatalan dibangkitkan. Di dalam kes sekarang ini, oleh kerana
C pemohon mendakwa taksiran 1987 adalah terbatal, s 2(a) tidaklah terpakai (lihat ms 379I–380A); *Semantan Estate (1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan* [1987] 2 MLJ 346 dibeza.

(4) Hanya semasa pembicaraan di hadapan penentang kedua, barulah
D pemohon telah mendapati bahawa penentang pertama telah mengisukan arahan dan notis taksiran tambahan tanpa sebarang keterangan baru. Ini adalah satu perkara yang baru sampai ke pengetahuan pemohon dan dengan itu menjelaskan terdapatnya kelambatan dalam memohon untuk kajian semula kehakiman (lihat ms 380A–B).

E (5) Pemohon tidak perlu menghabiskan kesemua remedi domestik dan hak-hak rayuannya sebelum memohon untuk certiorari. Budi bicara untuk memberikan remedi itu masih terletak dengan mahkamah tetapi di mana terdapat peruntukan rayuan yang boleh digunakan oleh pemohon, certiorari biasanya tidak patut
F dikeluarkan kecuali ditunjukkan terdapatnya kekurangan bidang kuasa yang jelas ataupun kegagalan yang nyata untuk menjalankan tugas statutori ataupun, dalam kes-kes yang wajar, pelanggaran yang serius akan prinsip-prinsip keadilan asasi. Penjumpaan fakta baru di dalam kes ini mungkin termasuk di bawah pengecualian yang dinyatakan. Pemohon oleh itu telah menerangkan
G kelambatan dalam membuat permohonan untuk kebenaran untuk perintah certiorari (lihat ms 380C–F); *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185 diikut.]

Notes

H For cases on judicial remedies, see 1 *Mallal's Digest* (4th Ed 1995 Reissue) paras 87–95.

For cases on prerogative writs/orders, see 2 *Mallal's Digest* (4th Ed 1994 Reissue) paras 2775–2848.

I **Cases referred to**

Ackroyd v Whitehouse (Director of National Parks and Wildlife Service) (1985) 2 NSWLR 239

Broad v Perkins (1888) 21 QBD 533

Chapman v Earl [1968] 1 WLR 1315
Federal Hotel Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers [1983] 1 MLJ 175
Gnanasundram v Public Services Commission [1966] 1 MLJ 157
Government of Malaysia v Jagdis Singh [1987] 2 MLJ 185
Kerajaan Malaysia v Dato' Hj Ghani Gilong [1995] 2 MLJ 119
London Corp v Cox (1867) LR 2 HL 239
R v Chief Constable of the Merseyside Police, ex p Calveley [1986] 2 WLR 144
R v HM Inspector of Taxes, ex p Brumfield 61 TC 689
R v HM Inspector of Taxes for District of Ashford & Ors, ex p Frost [1973] STC 579
R v IRC, ex p Preston [1985] 2 WLR 836
R v Inland Revenue Commissioners, ex p Sims [1987] STC 211
R v Jones [1969] 2 QB 33
Ravindran v Malaysia Examinations Council [1984] 1 MLJ 168
Ridge v Baldwin [1963] 2 All ER 66
Semantan Estate (1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan [1987] 2 MLJ 346
Tengku Anoomshah bin Tengku Zainal Abidin & Anor v Collector Land Revenue, North-East District & Anor [1995] 2 AMR 1509
United Asian Bank Bhd v Elgi Marka Sdn Bhd [1995] 1 CLJ 407
Walter Annamunthodo v Oilfield Workers Trade Union [1961] 3 WLR 650

Legislation referred to

Income Tax Act 1967 ss 91, 140
Public Authorities Protection Act 1948 s 2(a)
Rules of the High Court 1980 O 2 r 1(1), (3), O 53 r 1A

William Davidson (*Jonathan Yassin* with him) (*Ansari & Co*) for the applicant.

Abdul Karim bin Abdul Jalil (Senior Federal Counsel) for the Attorney General in respect of the application for leave.

Abdul Karim bin Abdul Jalil (Senior Federal Counsel) and *Kok Keng Fei* (Federal Counsel) for the respondents.

Cur Adv Vult

Tee Ah Sing JC: This is a notice of motion by the applicants for the following orders:

(a) an order that the first respondent's notice of motion dated 28 February 1995 be dismissed, the applicant's application for judicial review vide ex parte notice of originating motion K25–19–94 being filed within the time prescribed by O 53 of the Rules of the High Court 1980 ('the RHC 1980');

(b) as an alternative to para (a), an order for an extension of time for the filing of the applicant's application for leave to apply for certiorari to quash directions dated 30 November 1987 issued by the first respondent to the applicant pursuant to s 140 of the Income Tax Act 1967 ('the Act'), such extension of time to take effect from the expiry of six weeks from the date of the directions until:

(i) the date of the filing of ex parte notice of originating motion K25–19–94; or

(ii) such further time that this honourable court may deem fit;

(c) as an alternative to para (a), an order for an extension of time for the filing of the applicant's application for leave to apply for certiorari to quash notices of additional assessment, dated 7 and 8 December 1987, issued by the first respondent to the applicant pursuant to s 91 of the Act, such extension of time to take effect from the expiry of six weeks from the date of the notices until:

(i) the date of the filing of ex parte notice of originating motion K25–19–94; or

(ii) such further time that this honourable court may deem fit;

(d) an order that the costs of this application and all the costs incidental thereof be made costs in the cause or be paid in accordance with the discretion of this honourable court.

This application is supported by the affidavit of Goh Chee San affirmed on 15 March 1995. The relevant parts read as follows:

4 On 30 November 1987, the first respondent issued a series of directions ('the directions') to the applicant's then tax agents pursuant to the powers under s 140 of the Income Tax Act 1967 ('the Act'). The directions stated that payments made by the applicant between the years of assessment 1980 and 1987 to the Sabah Foundation (which enjoyed tax exempt status as a charity by virtue of s 44(6) of the Act), would be treated as dividends and hence not be allowed as deductions for tax purposes. I am now shown the affidavit of Susanna Willie sworn on 10 November 1994 and can confirm that the directions issued by the first respondent to the applicant's then tax agents are marked therein as exh SW7.

5 The payments referred to in para 4 were originally treated by the first respondent as approved donations and were, therefore, allowed as deductions under the Act.

6 On 7 and 8 December 1987, in purported exercise of the powers under s 91 of the Act, the first respondent issued the applicant a series of notices of additional assessment for the years of assessment 1980 and 1987 ('the notices of additional assessment'). The notices of additional assessment followed the original notices of assessment for the years of assessment 1980 to 1987 ('the original notices of assessment') except that the donations allowed in the original notices of assessment were now treated as dividends and hence were no longer allowed as deductions for tax purposes. (For the year of assessment 1985 the applicant was not originally assessed as being liable to pay income tax. The notice of assessment issued by the first respondent in December 1987 for the

year of assessment 1985 was, therefore, the first notice of assessment received by the applicant for that year. For convenience the notice of assessment for the year of assessment 1985 is referred to collectively with the notices of additional assessment as 'the notices of additional assessment'). A

8 The applicant's then tax agents lodged a notice of objection against the directions and the notices of additional assessment. I can confirm that this notice of objection is marked as exh SW9 in the affidavit of Susanna Willie sworn on 10 November 1994. B

9 On 12 March 1988 the applicant filed formal appeals against the directions and the notices of additional assessment with the second respondent pursuant to s 99 of the Act. I can confirm that these formal appeals are marked as exh SW10 in the affidavit of Susanna Willie sworn on 10 November 1994. C

10 I am advised by counsel and verily believe that from the facts available to the applicant and its legal and tax advisors before the hearing of the appeals by the second respondent, the applicant was in no position to establish that the first respondent acted without evidence when invoking the powers under s 140 and s 91 of the Act to issue the directions and the notices of additional assessment. D

11 I am advised by counsel and verily believe that in the absence of special circumstances and evidence showing that the first respondent clearly had no jurisdiction to issue the directions and the notices of additional assessment, or had failed to carry out some statutory duty or had committed a serious breach of the rules of natural justice, the applicant would have been obliged to exhaust the appeal procedure provided by the Act before seeking relief through the avenue of judicial review. E

12 I am advised by counsel and verily believe that the facts available to the applicant before the hearing of the appeals by the second respondent did not establish the existence of special circumstances and evidence of the type referred to in para 11. I am further advised and verily believe that this state of facts would have meant that it was highly probable that an application by the applicant for judicial review before the hearing of the appeals by the second respondent would have been dismissed on the ground that the appeal procedure provided by the Act presented the applicant with an adequate avenue of relief. F G

13 On 26 September 1994 the applicant's appeals to the second respondent were heard. I attended the appeals and gave evidence on behalf of the applicant.

14 During the hearing of the appeals I kept notes, in summary form, of the following: H

(a) the evidence given by the applicant's other witness, Ms Susanna Willie;

(b) the evidence given by the first respondent's only witness, a Mr Doraisamy;

(c) submissions made by counsel for the applicant and first respondent;

(d) the grounds of judgment given orally by the second respondent.

A copy of these notes ('my notes') is annexed to this affidavit and marked exh GCS2. I

15 The first respondent's only witness, Mr Doraisamy, said in his evidence that he was called in to investigate the applicant's tax affairs after the

first respondent issued the directions and the notices of additional assessment. This is duly noted at p S6 of my notes.

16 Mr Doraisamy said during his examination-in-chief and cross-examination that the first respondent's conclusion that the applicant's payments to the Sabah Foundation were dividends and not donations was based on the following:

(a) the fact that the Sabah Foundation owned all the shares in the applicant;

(b) documents extracted from the Sabah Foundation's offices after the first respondent had issued the directions and the notices of additional assessment; and

(c) the fact that the applicant only made donations to the Sabah Foundation.

Mr Doraisamy's evidence on this point is recorded at p S6 of my notes ('The Sabah Foundation' is referred to in my notes as 'YS').

17 When the first respondent issued the original notices of assessment it was clear that:

(a) he knew that the Sabah Foundation owned all the shares in the applicant. This knowledge was part of public records;

(b) he knew that the applicant only made donations to the Sabah Foundation as these donations were the only payments allowed for as deductions in the original notices of assessment.

18 The existence of any new circumstances that may remotely have justified the first respondent issuing the directions and the notices of additional assessment to override the original notices of assessment could only be determined by scrutinizing the documents that were extracted from the Sabah Foundation's offices.

19 According to Mr Doraisamy these documents were extracted from the Sabah Foundation's offices after the first respondent issued the directions and the notices of additional assessment. It is therefore clear that:

(a) at the time of the issue of the directions and the notices of additional assessment the first respondent had no evidence of new facts that justified a departure from the original notices of assessment;

(b) the first respondent issued the directions and the notices of additional assessment and then proceeded to look for evidence to justify his actions retrospectively.

20 I am advised by counsel and verily believe that the first respondent's actions in issuing the directions and the notices of additional assessment before seeking evidence in justification clearly:

(a) were done without jurisdiction;

(b) constituted a serious breach of the statutory provisions of the Act, which required that the powers and duties therein be exercised only if there is evidence justifying their exercise; and

(c) constituted a serious breach of the rules of natural justice, which required the first respondent to provide a taxpayer the opportunity to be heard before the first respondent utilizes the powers under ss 140 and 91 of the Act.

21 I am advised by counsel and verily believe that the first respondent's breaches of the law listed in para 20, as first revealed during the course

of the appeal before the second respondent, clearly show the existence of special circumstances that justify the applicant seeking judicial review rather than be confined to the appeal procedure provided by the Act.

22 I am reinforced in my belief that the procedure provided by the Act is an inadequate avenue of relief by virtue of the grounds given orally by the second respondent when dismissing the applicant's appeals. In coming to the conclusion that the payments made by the applicant to the Sabah Foundation were not donations, the second respondent relied heavily on a document referred to in the appeals as R7. This document was one of the documents obtained by the first respondent's officers after the directions and the notices of additional assessment were issued. The reliance of the second respondent on this document shows that the serious breaches of law committed by the first respondent have not been remedied by the appeal procedure provided by the Act. I can confirm that the document referred to herein as R7 is marked as exh SW3 in the affidavit of Susanna Willie sworn on 10 November 1994.

23 I am advised by counsel and verily believe that the applicant's application for leave to apply for certiorari to quash the directions and the notices of additional assessment issued by the first respondent was filed within the time prescribed by the rules of court as the prescribed time for making this application only began to run from the date of the second respondent's deciding order. The applicant filed its application for leave to apply for certiorari to quash the directions and the notices of additional assessment issued by the first respondent within six weeks of the second respondent's deciding order.

24 I am advised by counsel and verily believe that even if the applicant delayed in seeking the remedy of certiorari to quash the directions and the notices of additional assessment issued by the first respondent, such delay was explicable on the grounds that:

(a) the applicant had no reason to believe that there existed special circumstances to justify judicial review in preference to the appeal procedure provided by the Act when the first respondent issued the directions and the notices of additional assessment in 1987. Hence any application for judicial review at the time would probably have been dismissed;

(b) the applicant only discovered that the first respondent issued the directions and the notices of additional assessment before seeking evidence in justification during the hearing of the appeals before the second respondent in 1994. The discovery of this fact constitutes special circumstances that justify judicial review in preference to the appeal procedure provided by the Act. The applicant sought judicial review without delay after making this discovery;

(c) the effect of these special circumstances is that the first respondent had no jurisdiction/right to issue the directions and the notices of additional assessment without first seeking evidence in justification. The first respondent also, therefore, had no jurisdiction to refer this matter to the second respondent. As such, the second respondent had no jurisdiction to hear the applicant's appeals under the Act. This lack of jurisdiction cannot, in all probability, be cured by the appeal procedure provided by the Act.

25 I am advised by counsel and verily believe that the applicant's application for leave to apply for certiorari to quash the deciding order of the second respondent was filed within the time prescribed by the rules of court and is, therefore, unaffected by the question of delay.

Learned counsel for the respondents submitted that the issue whether the applicant's application for leave to issue certiorari was filed within time should be decided first. I then made a ruling that this issue should be dealt with first.

There are two cases involving the same issues. The cases are *Sabah Berjaya Sdn Bhd* in respect of Originating Motion No K25–19–94 and *Rakyat Berjaya Sdn Bhd* in respect of Originating Motion No K25–19–94.

Both parties agreed that the submissions will be based on *Sabah Berjaya Sdn Bhd* and that the decision in this case will bind the other case.

Learned counsel for the applicant submitted that the application was filed within six weeks from the date of the deciding order, the relevant dates being 4 October 1994 and 10 November 1994. Therefore so far as the application is directed at the deciding order, the application is clearly within time.

Both the 1987 assessments and the 1994 deciding order are under attack in the proceedings. He submitted that since the validity of the deciding order rests upon the validity of the additional assessments, therefore both must be challenged together and can be regarded as one proceedings for the purposes of O 53 r 1A of the RHC 1980. And therefore the whole of the application is in time.

Alternatively if for the purpose of challenging the 1987 assessments time is taken to run from the date of issue of the notices, the delay is then completely explained by the fact that the applicant was in the course of fulfilling its obligation to exhaust its domestic remedy by going through the second respondent first; and that the long delay in obtaining a hearing before the second respondent was totally beyond the control of the applicant.

The rule that a party must exhaust its domestic remedy before applying for judicial review is not an absolute rule going to the jurisdiction and exceptional circumstances may exist to displace the rule.

In support the following cases were cited:

(1) *Government of Malaysia v Jagdis Singh* [1987] 2 MLJ 185;

(2) *Gnanasundram v Public Services Commission* [1966] 1 MLJ 157; and

(3) *R v HM Inspector of Taxes for District of Ashford & Ors, ex p Frost* [1973] STC 579.

And this is precisely what they have done in this case.

Another excuse for delay in seeking judicial review may include a 'matter newly come to the knowledge of the applicant' (*London Corp v Cox* (1867) LR 2 HL 239 cited in *Broad v Perkins* (1888) 21 QBD 533). The evidence of Doraisamy only emerged during the hearing before the second respondent and would not have been reasonably discovered earlier.

Paragraph 43 of the statement attacks the deciding order itself on the grounds of lack of jurisdiction and therefore no extension of time is required. A

Learned counsel for the respondents submitted by reference to the notice of motion by the applicant dated 17 March 1995 that that in substance is an application for extension of time to apply for leave. Paragraph (a) of the notice of motion is a 'red herring'. B

He submitted that the application for extension of time was not properly before the court. An extension of time must be obtained before the application for leave could be heard.

It should be an originating application for extension of time before the application for leave could be heard. On this point he submitted that the application was not before the court. C

His second point is that s 2(a) of the Public Authorities Protection Act 1948 ('the PAPA 1948') is a bar to this application. He submitted that the directions and notices of additional assessment which the applicants sought to quash were dated 30 November and 8 December 1987 respectively. D

Therefore this application for extension of time is approximately seven years from the alleged defaults complained of.

In support he cites the case of *Semantan Estate (1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan* [1987] 2 MLJ 346 where it was held by the Supreme Court that the application is barred by virtue of s 2(a) of the PAPA 1948. It also stated that the term 'suit' in s 2(a) includes applications for prerogative writs. As such he submits that the application for extension of time must fail on this ground alone. E

His third point which is in the alternative to the second point is that the applicant has not shown good grounds for the delay in applying for judicial review. Under O 53 r 1A of the RHC 1980, the date of the proceeding is the date on which the directions and the notices were issued. F

He disagreed with the submission of learned counsel for the applicant that the 1987 assessments and the 1994 deciding order can be properly regarded as one proceedings for the purposes of O 53 r 1A of the RHC 1980. The duties of the first respondent and the second respondent are separate and distinct. Therefore the act of the first respondent in issuing the assessments in 1987 and the decision of the second respondent cannot be regarded as one proceedings. It is necessary therefore for the applicant to apply for the extension of time. G H

He submitted that the domestic remedy has not been exhausted. The case stated is already filed in the court and is awaiting a hearing date.

As regards the case of *Gnansundram v Public Services Commission* [1966] 1 MLJ 157, it can be distinguished on the ground that in our case the applicant has not exhausted its domestic remedy. I

As regards the second ground he submitted that there was no discovery of new facts. All the facts were known to the applicant from the very beginning.

A He submitted that the question of jurisdiction was not raised at all before the second respondent.

He cited three cases where explanation as to delay was not accepted namely:

B (1) *Ravindran v Malaysia Examinations Council* [1984] 1 MLJ 168;

(2) *R v Inland Revenue Commissioners, ex p Sims* [1987] STC 211;

(3) *R v HM Inspector of Taxes, ex p Brumfield* 61 TC 689.

He submitted that the delay of seven years in itself would disentitle the applicant to the remedy of judicial review. The case of *Semantan Estate* C *(1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan* [1987] 2 MLJ 346 at p 349I right was cited.

And the court should not exercise its discretion in granting the application for extension of time.

Learned counsel for the applicant in reply stated that prayer (a) of D the notice of motion is not a 'red herring'. In reply to the submission of the learned counsel that they should have filed a separate originating process and not a notice of motion to deal with the time factor, he submitted that if the court was of the view that there was a procedural irregularity, he would pray in aid O 2 r 1(1) and O 2 r 1(3) which say in substance, firstly, that any non-compliance with the rules, if there is one, should be treated E as an irregularity and not a nullity; and secondly, that the court should not wholly set aside the application on the grounds of the wrong originating process.

In respect of the PAPA 1948, firstly, he submitted that since the validity of the deciding order rests upon the validity of the additional F assessments, both must necessarily be challenged together. They can properly be regarded as one proceedings for the purpose of O 53 r 1A. Secondly the main argument of their case is that the notices of assessments issued in 1987 are void and indeed a total nullity.

In support the following were cited:

G (a) *R v IRC, ex p Preston* [1985] 2 WLR 836;

(b) *Ridge v Baldwin* [1963] 2 All ER 66;

(c) Wade *Administrative Law*, (6th Ed);

(d) *United Asian Bank Bhd v Elgi Marka Sdn Bhd* [1995] 1 CLJ 407;

H (e) *Tengku Anoomshah bin Tengku Zainal Abidin & Anor v Collector Land Revenue, North-East District & Anor* [1995] 2 AMR 1509.

He submitted that the case of *Semantan Estate (1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan* [1987] 2 MLJ 346 dealt with an application for mandamus. There was no question of a void decision I whereas in a certiorari, a number of the cases deal with quashing decisions which are held to be nullities. That is the explanation why in *Semantan Estate* there are no nullity issues at all.

Both on principle and on authority, where the order sought to be quashed is totally a nullity, the time limit found in s 2 of the PAPA 1948 simply has no application.

In reply to learned counsel for the respondent, it was submitted that the applicant should follow the case stated right through. Learned counsel for the applicant submitted that they have two quite separate claims. The first claim, which is the claim they are seeking to pursue in this court, is called the nullity issue. In so far as the primary target is the first respondent, the issue is the circumstances in which the assessments in 1987 were issued, which they say constitute unfair dealing within the meaning of the cases referred to in paras 14 to 22 of the written submission.

The second claim is a claim based on the technical merits of the deciding order and which hinges on the construction and effect of s 140 of the Act which they say is a proper subject for the case in the stated appeal.

As to the propriety of the proceedings with both remedies at the same time, learned counsel for the applicant cited the following:

(a) Wade *Administrative Law* (6th Ed) at p 714;

(b) *Ridge v Baldwin* [1963] 2 All ER 66 at p 81G–I;

(c) *Walter Annamunthodo v Oilfield Workers Trade Union* [1961] 3 WLR 650 at p 656;

(d) *Ackroyd v Whitehouse (Director of National Parks & Wildlife Service)* (1985) 2 NSWLR 239 at pp 248 and 249.

It may then be asked: 'Well, can't both issues be dealt with on the case stated appeal?' It is his contention that there are grave limitations on the use of the case stated procedure for the second respondent to find the facts and to state the question of law.

He cites the case of *Kerajaan Malaysia v Dato' Hj Ghani Gilong* [1995] 2 MLJ 119 at p 126.

As to the judicial review being the appropriate procedure for the nullity issue, he referred to the following cases:

(a) *Chapman v Earl* [1968] 1 WLR 1315;

(b) *R v Jones* [1969] 2 QB 33;

(c) *R v Chief Constable of the Merseyside Police, ex p Calveley* [1986] 2 WLR 221.

The new facts which they rely on are set out at p 36 of the statement dealing with the evidence of Doraisamy to confirm in evidence that he only became involved after the decisions were taken and was not able to explain the reasons for the decisions. In short he was asked to go look for evidence. This was not a fact which was within the knowledge of the applicants earlier. Its significance can only be fully appreciated when the court has heard their exposition of the cases on the merits but in short, it compounds and confirms the absolute arbitrariness of the action taken and which is similar in nature to the complaints made like that in *R v IRC, ex p Preston* [1985] 2 WLR 836.

A In reply to learned counsel for the respondents, the contention was that the applicant did not raise the issue of jurisdiction before the second respondent. Learned counsel for the applicant submitted that there can be no waiver where there is lack of jurisdiction. He cited the case of *Federal Hotel Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers* [1983] 1 MLJ 175 at p 178.

B Order 53 r 1A of the RHC 1980 provides, inter alia, that leave shall not be granted to apply for an order of certiorari unless the application for leave is made within six weeks after the date of the proceeding or the delay is accounted for, to the satisfaction of the court or judge to whom the application is made.

C The directions and notices of additional assessment were issued by the first respondent on 7 and 8 December 1987. On 12 March 1988 the applicant filed notices of appeal against the directions and notices of additional assessment with the second respondent.

On 26 September 1994 the applicant's appeals to the second D respondent were heard. The deciding order of the second respondent was issued on 4 October 1994; and the application for leave to apply for an order of certiorari was filed on 10 November 1994.

I agree with the contention of learned counsel for the respondents that the 1987 assessments and directions and the 1994 deciding order E cannot be regarded as one proceedings for the purposes of O 53 r 1A. This is because the duties of the Director General and the second respondent respectively are separate and distinct.

So it is very clear that there is a delay of about seven years.

Thus the applicant had therefore to account for the delay to the F satisfaction of the court. The reasons for the delay as can be gathered from the statement and the affidavit of Goh Chee San affirmed on 15 March 1995 are as follows:

1 With a view to first exhausting their domestic remedy under the Act, the applicant on 12 March 1988 lodged formal appeals with the second G respondent.

2 At the hearing before the second respondent, the first respondent called only one witness, an assessment officer name Doraisamy who stated in evidence that he was only involved in the case after the said directions and additional assessments had already been issued.

3 According to Doraisamy the documents were extracted from the Sabah H Foundation's office after the first respondent had issued the directions and the notices of additional assessment.

I accept the submission of learned counsel for the applicant that the delay of the hearing of the appeal before the second respondent was beyond the applicant's control.

I I agree with the submission of learned counsel for the applicant that s 2(a) of the PAPA 1948 is not applicable where issues of nullity are raised. Therefore the case of *Semantan Estate (1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan* [1987] 2 MLJ 346 which is an application for

an order of mandamus wherein s 2(a) of the PAPA 1948 was invoked, does not apply where issues of nullity are raised.

I accept the explanation of the applicant that they have to exhaust their domestic remedies first before applying for an order of certiorari.

Further it was only at the hearing before the second respondent that the applicant discovered that the first respondent had issued the directions and additional notices of assessment without any new evidence. According to Doraisamy, the evidence was obtained after the directions and notices of additional assessment were issued.

I agree with the contention of learned counsel for the applicant that this is a 'matter newly come to the knowledge of the applicant'. This is another excuse for the delay in seeking judicial review.

I do not agree with the submission of learned counsel for the respondents that the applicant should have exhausted all domestic remedies before applying for certiorari.

It is pertinent to cite the case of *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185 where the Supreme Court at p 189 stated:

> *Re Preston* was a tax case. It was quite clear from the speeches of their Lordships in the House of Lords that the Inland Revenue Commissioners were not immune from the process of judicial review. But what was also made clear is that remedy by way of judicial review is not to be available where an alternative remedy exists except in very exceptional cases.
>
> In answer to the first question we would therefore hold that the discretion is still with the courts but where there is an appeal provision available to the applicant, certiorari should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice.

The discovery of this new fact by the applicant may come within the exception in *Jagdis Singh* that 'certiorari should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform a statutory duty or in appropriate cases a serious breach of the principles of natural justice'.

I am satisfied that the applicant has accounted for the delay in making the application for leave for an order of certiorari.

Application allowed.

Reported by Ng Sheau Jiuan